

Nowakowski, Sonja

From: Leroy Beeby <lebeeby@yahoo.com>
Sent: Thursday, July 19, 2018 12:03 AM
To: Nowakowski, Sonja; Zolnikov, Daniel; Skees, Derek; Perry, Zac; Bishop, Laurie; McNally, Mary; Sales, Scott; tomrichmondmt@gmail.com; natefords48@gmail.com
Subject: LC SMW2
Attachments: ETIC Comments 07182018.docx

Dear Committee Members:

Thank you for the opportunity to allow me to work with Sonja on the draft. I sincerely hope you, as a committee, will go forward with the proposal. I'll be the first to admit it is not perfect, but it is a very good start. I have had the unique opportunity to be on both sides of this proposal as a regulator and as a consultant for these small utilities. As a regulator, I saw the problems facing these small water companies, and worked with Commissioner Gallagher to draft what we felt was a workable solution. The efforts of the Montana Consumer Counsel and the proposed rules by the Commission completely undoes the intent of the small water rules and adds an extra burden on these small companies. Given the tenor of the rules, a company would be foolhardy to request a standard interim rate. The Commission's proposed "simplified regulatory treatment option" is anything but simplified.

Thank you -- Leroy Beeby 406-431-9411

Attached are my comments.

Date: July 20, 2018

To: Energy and Telecommunications Interim Committee

From: Leroy Beeby – Independent Consultant

RE: Proposed Small Water and Wastewater Utility Regulation LC SMW2

Thank you for time and listening. It is much appreciated.

First, I'd like to address the new proposed rules the Public Service Commission (PSC, Commission) is implementing with regard to the small water and wastewater utilities.

The Commission's proposed Rule Amendment Option 2 with additional amendments, succeeds in completely negating the original intent of the simplified rules. In addition, it adds unnecessary complexity to what should have been a simple rule making process. The proposal shows the new rules with amendments to the new rules but fails to compare with the original rules. As a simple example, 38.5.2501 in the chosen Rule Amendment Option 2 with amendments states "(1) and (2) remain as proposed." This leads you to believe there was a proposal to those sections. If you look at Rule Amendment Option 2 that same section states (1) and (2) remain the same, necessitating looking to see exactly what (1) and (2) are. One cannot help but wonder if confusion was the intent of the Commission in its drafting of these Rule Amendment Option 2 with additional amendments.

That aside, based on these rules, it is plain to see that the Commission has zero desire to lessen the burden of regulation for small water and wastewater utilities. In fact, the Commission is with its rules implementing a much more burdensome process in order for a company to even be granted interim standard rates and Commission staff gets to dictate what those rates are (Proposed Rule Amendment Option 2 with additional amendments, 38.5.2528(2)). In addition, a company can only qualify for the temporary standard rates if they have never been regulated by the Commission. If a company has operated in the past outside the Commission purview, it is subject to all penalties as provided by statute (Proposed ARM 38.5.2501(3)). Previously, those penalties were an optional enforcement by the Commission. This rule makes those penalties mandatory. Further, a company is required to self-incriminate in order to be granted these three-year interim rates (Proposed Rule Amendment Option 2 with additional amendments, ARM 38.5.2528(4)(a-j & n)). The civil penalties can be in excess of \$1,000 per day.

What happens after the three-year interim rates expire? The company must file for rates under the operating ratio methodology, which has its own unique set of problems as addressed later, or a full rate case. Because the rates are "interim", any over-collection is subject to refund and in theory, any under-collection would be collected by the company as a surcharge. In my 18 years at the Commission, I have never seen nor heard of a surcharge allowed to a company because of under-collection, so the realistic likelihood of that is zero regardless if the company is entitled. I have, however, seen a company ordered to refund to customers, even though the PSC believes those present rates are interim rates, and not final rates.

The Montana Consumer Counsel (MCC) has at its disposal at least two attorneys, two analysts, an administrative assistant, and if need be, it can hire outside consultants. Often, the small utilities simply cannot afford to hire attorneys and consultants to represent its interests at the same level as the MCC and maintain affordable rates. Regardless of what happens, the company is blamed for any increases. The Commission has at least 4 attorneys, 3 revenue analysts, a number of rate design analysts and support staff. When the Commission was asked to bifurcate its staff and provide an attorney for a small water and wastewater utility, Commission staff, without taking it to the Commission for decision, unilaterally denied the request, citing a conflict of interest. The Commission has bifurcated the staff in the past, so the concept is not new. All this company was asking was to be on a level playing field with the MCC.

It is interesting to note that this next Tuesday, July 24, the Commission has on their action agenda six pending cases for requests for standard rates. The shortest time that any of these companies has been waiting for a decision by the Commission is almost five months, with one company waiting well over a year. ARM 38.5.2528(8) states "The commission will act on the request to adopt the standard rate tariff no later than 45 days after it is received by the commission". It is a travesty that a company is held hostage by the Commission for this long of a period of time. Under the new Rule Amendment Option 2, the 45-day requirement for the PSC to act has been eliminated so the wait times now are at the discretion of the Commission.

The following companies are on the agenda and have been waiting for the Commission to determine to continue standard rates or require a different process:

NorthStar Planned Unit Development – Since February 28, 2018
Glacier Point Water and Wastewater – Since October 18, 2017
Circle H Water – Since March 9, 2017
Indian Springs Ranch Water and Sewer – Since October 19, 2017
Williams Water Works – Since November 1, 2017
Alpine Pacific Utilities – Since September 13, 2017

I can't help but think that your review and consideration of either deregulating or proposing standard rates in law for these small utilities finally prompted their response and the Commission's sudden eagerness in "solving its own problem". Personally, I'd like to see all of the above companies be granted the continuation of standard rates for another three years in order for this legislation to either be passed or rejected. If the standard rates are not continued, a procedural schedule for each of these companies will need to be set. The procedural schedule will be at the convenience of the Commission and the Montana Consumer Counsel exacerbating the already excessive delay. The "abbreviated" schedule usually proposed by the Commission and championed by the MCC as less costly for the company is an asymmetrical proceeding where both the MCC and the PSC staff are allowed to ask discovery questions of the company and the MCC is allowed to write testimony on that discovery. The company is not provided with the opportunity to ask discovery of the MCC. As a result, the "limited" process has allowed the MCC to be very creative in its testimony and may be a violation of due process.

The PSC supports its “operating ratio” as does the MCC, citing its simplicity and the theoretical resultant reduction in consulting and legal costs to the company. The present operating ratio is unfair and unworkable to any company that has assets. The model does not allow for recovery of depreciation, and as a result does not allow for recovery of assets. This could be construed as confiscatory ratemaking and may be illegal. The model also does not allow for interest expense recovery. In essence, these two items dictate that if a company purchases equipment to extend the life of an asset, and has to borrow money to do so, not only does it not receive recovery of the asset, the interest is a non-recoverable expense as well. The operating ratio was developed with no input from the water and sewer companies nor were there any public meetings with the Commission to discuss the development of the operating ratio. In fact, the model has changed from the first proposed operating ratio method and apparently can change at the whim of the Commission staff, with zero input from affected parties. There is no basis for the “return” of 20% on expenses and no basis why some expenses are allowed a return and other expenses are not. These are just a few of the reasons that the operating ratio method at a minimum, needs to be memorialized in rule through an open and transparent process. The proposed standard rate legislation LC SMW2 for all practical purposes would negate the necessity for the operating ratio methodology.

The draft LC SMW2 refers to the biannual DNRC survey report of average water and sewer rates. The 2016 report listed all the respondents to the survey and the rates being charged. When I looked at the 2018 report, it was lacking in that detail. I was left wondering if the proposal to tie to the DNRC survey was practical. I realized that the 2016 survey did most of the “heavy lifting” with that report. The 2018 and beyond encompass the changes in rates of the respondents and not a survey from square one like the 2016 survey. It should be relatively easy for either the PSC or DNRC to maintain a spreadsheet encompassing the 2016 survey as a baseline and any additions or changes going forward. It should require minimal additional staff time and substantially less time than any abbreviated process the MCC or PSC is presently proposing.

In summary, I think LC SMW2 is a good alternative to what is presently in place and exponentially better than what is being proposed by the Commission in its rules. It allows for Commission oversight for protection of the consumers, it is an affordable option for the small utilities to be in compliance, it stabilizes rates for the consumers, and it allows companies the flexibility to control its costs without a corresponding impact on revenues. Giving the Commission or the company the ability to phase in rates over a three-year period helps alleviate any rate shock that may occur as a company moves to standard rates. There are many more problems with the Commission’s proposal I’d be happy discuss with you, but I’ve taken up enough of your time.



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June 25, 2018

VIA EMAIL to snowakowski@mt.gov

Sonja Nowakowski
Office of Research and Policy Analysis
Legislative Services Division

RE: *ETIC changes for small water and sewer utility regulation*

Dear Ms. Nowakowski:

I write on behalf of some small water utility clients in support of LCSMW1, which would exempt a “small sewer or water utility” from PSC regulation. I believe this is the simplest solution and would resolve the issues that are arising at this time. Still, LSSMW2 would also improve the current law, but could benefit from some suggested revisions as noted below.

1. LCSMW1 is the preferred option

As you know, a significant majority of small water utilities have not filed rate schedules with the PSC and are avoiding PSC oversight. The PSC has not enforced this non-compliance, perhaps because it would overburden the small agency. So in reality, the rates of most small water and sewer utilities are set outside the PSC.

Because small water utilities by definition service less than 500 people – usually servicing a subdivision, mobile home park, or villages – a reasonable rate seems to be naturally set at an amount that is sufficient to maintain the system, and is acceptable to the consumers, while building in a reasonable profit for the utility. The consumers can always complain to the utility if they feel rates are unfair. I suspect the PSC gets occasional complaints about rate increases or other problems, but probably not enough to justify regulation. Given the small percentage of small water and sewer utilities that have filed rates with the PSC, one would assume that the PSC does not receive many complaints; otherwise, presumably the PSC would have taken some kind of enforcement action against more utilities. Further, private and municipal water and sewer systems are already exempt from regulation; and, as far as I know (and the PSC may have more insight on this), this has not caused major problems either. The small water and sewer utilities would still be subject to regulation from DEQ and DNRC.

Rather, it is the small water and sewer utilities that actually attempt to follow the current law and file for PSC rates that can suffer high transaction costs and regulatory uncertainty. For example, Holmberg Village Water Company, LLC (“Holmberg”) applied for the standard rate tariff and it took nearly two years to obtain it, and it incurred legal and expert consultant fees in the process. In normal rate cases, these costs could get passed on to the ratepayer, but Holmberg has been forced to pay these costs itself. While the standard rate rules are intended to simplify and streamline the regulatory process, in reality that is not always the case. Rather, some small water and sewer utilities are incurring significant legal and consulting fees to navigate the process, specifically when there is an objection to the application. Small sewer and water utilities typically lack the staff or financial resources to file a rate case, and the PSC is not yet allowing cost recovery in standard rate cases.

If the PSC were to ever demand compliance, it would surely be inundated with new cases. It is unclear how many other small water and sewer utilities are lurking out there, but I suspect the current estimate of 221 cited in the Program Evaluation may be low. If all of these utilities came out of the woodwork, the burden on the PSC would be significant, and the PSC would have trouble adequately overseeing the utilities with its current staffing.

I don’t see a particular need for regulation of small water utilities, and I believe the balance lies in favor of deregulation. As I understand it from the PSC’s Memorandum to ETIC, some states do not regulate small water and sewer utilities. It would be worth investigating the historic success of that approach.

As an aside, in your Program Evaluation, you note the Oregon law. That concept may be worth exploring too. It appears Oregon only submits small water and sewer utilities to regulation if they charge above a certain threshold. Doing something like this could strike the middle ground that keeps prices in check and decreases regulatory costs. The threshold number could be tied to the Montana Statewide Water and Wastewater Rate Study averages charged by utilities servicing less than 500 people. If a utility wishes to charge more than that amount, it could file an application with the PSC.

2. LCSMW2 is a good alternative, but could use some revision

This alternative proposed legislation should also fix some of the issues at the PSC level. Particularly, the new Section 3 makes clear that the standard rate set by the PSC is “just and reasonable,” and that the PSC “shall grant the standard rate.” There has been some dispute between the utilities, the Montana Consumer Counsel, and the PSC over whether a uniform standard rate is just and reasonable (we believe it is). With this codified in statute, hopefully that uncertainty will be resolved going forward. In that sense, the statute would add regulatory certainty to utilities and the PSC.

Still, inevitably, I see ways in which this statute will not play out as intended. For example, the new Section 3 at (4)(b)(ii) states the PSC does not need to grant the standard rate if it receives complaints about the utility’s rates. While the PSC should have some degree of

Sonja Nowakowski
June 25, 2018
Page 3 of 3

discretion when challenges arise, this would theoretically allow a customer or the Consumer Counsel to continue to challenge the standard rate, likely leading to a contested case. So we are not really fixing the problem. If a utility is entitled to elect a standard rate, how can the rate then be challenged? I think the purpose of the legislation should be to minimize or avoid the contested cases that can occur with each application and assure some kind of streamlined process envisioned in the standard rate rules. My proposed solution would be to add some clarifying language to the new section as follows:

(ii) the commission receives complaints or concerns pertaining to the utility's service, rates (excepting complaints to standard rates), or both, and the commission determines those complaints and concerns warrant additional review.

Also, the statute does not require small water and sewer utilities to file rate applications with the PSC. This is really an all or nothing issue – either the PSC does not regulate the small water and sewer utilities, OR it regulates all of them (thereby requiring compliance). Right now, most small water and sewer utilities have not set rates with the PSC, and I am not sure this new legislation would do much to change that. That is unfair to the few small water and sewer utilities, like Holmberg, who have voluntarily filed for rates with the PSC.

Sincerely,



Mac M. Smith
Partner

cc: Jamison Walker, Esq. (via email)

2221.001.02 – PL 280542



A Division of Wolfe Water Management, Inc.

Montana state-certified water and wastewater operation

5368 N. Montana

Helena, Montana 59602

June 11, 2018

Sonja Nowakowski
Research Analyst, Legislative Environmental Policy Office,
Montana State Legislature
Via email: legresponse@mt.gov
PO Box 20170
Helena, MT 59620-1706

June 18, 2018

Re: Small water - ETIC -Comments regarding LCSMW-2.

Dear Sonja:

I am a proponent of the proposal to exempt small sewer and water utilities all together (LCSMW1), but in the alternative, I am a proponent of this proposal (LCSMW2) that would place a standardized rate on small sewer and water utility customers and allow the commission some limited regulation.

I think Legislative Services has provided some of the finest background on the issue of small sewer and water facilities. I find it hard to add more. Please understand that small systems rely on well-trained employees who require extensive training and licensing. The bulk of what a rate pays for is for expensive equipment, people, and insurance, NOT huge profits as the Montana Consumer Counsel suggests.

LCMW2 has only one possible flaw: In proposed NEW SECTION 3 (4)(b)(ii), it is not seemly to have the public service commission step in and require an exhaustive process upon receiving one single complaint or concern. My problem is that a threshold number (as in NEW SECTION 3(3)(b)) is helpful, in that it keeps favoritism to a minimum. Therefore, a small sewer or water

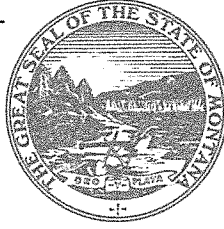
utility is not held hostage by a single customer and his/her small group of friends.

Small water and sewer utilities need a great degree of common sense.

Integrated Water, Inc.

By _____
Debra Wolfe, Regulatory Administrator

Montana Public Service Commission



Legislative Services Division
Attn. Sonja Nowakowski
P.O. Box 201704
Helena, MT 59620-1704
Public Comment on LCSMW1

Brad Johnson - Chairman
Travis Kavulla - Vice Chairman
Roger Koopman - Commissioner
Bob Lake - Commissioner
Tony O'Donnell - Commissioner

Dear Committee Members:

On behalf of the Public Service Commission, I'd like to submit the following public comments.

Our impression of this bill is a positive one, with a couple reservations.

The bill's purpose, exempting small water and sewer utilities from public service commission regulation, is attractive for the following reasons.

1. First, the sheer number of small water and sewer utilities in need of regulation is such that regulating all of them would pose a very serious burden to the PSC's current staffing levels.
2. Second, of that number of small water and sewer companies, at least 200-500 are not currently operating under the PSC's regulatory umbrella at all. We are not in contact with them.
3. We have not yet had success in persuading small water and sewer utilities to come forward and be regulated. The PSC is not historically in the business of seeking out companies to regulate, operating rather on a model where utilities come to us.
4. Bringing those small water and sewer utilities under our regulation would require additional staff.

The status quo – where most small water and sewer companies operate essentially unregulated – appears to be working, at least as measured by complaints received. The public service commission has received very few complaints from members of the public about rates charged by or practices of their small water and sewer utility. We should accept that as at least *prima facie* evidence that the demand for regulation is relatively low.

Even so, it's important to preserve citizens right to take action if the rates or services provided by a small water and sewer utility are unjust. LCSMW1 does that by allowing appeals to the district court.

At the demand level we're seeing now, citizen complaints, when spread out among Montana's 22 Judicial districts and 46 district court judges, seems unlikely to pose an undue burden.

The commission's reservations focus on two subjects. First, this bill dilutes Montana's message on utility regulation somewhat. As it stands now, if the public has no choice but to receive

services from a utility, the utility is regulated by the public service commission. If this bill becomes law, that will no longer be the case. Some monopoly utilities will be regulated by the commission, when others aren't.

Second, it seems unclear what role the Montana Consumer Counsel ("MCC") plays in the regulatory scheme proposed in this bill. Section 4(3) requires that small water and sewer utilities mail a notice of their intent to establish or change rates with the MCC. However, Section 5 vests the right to appeal only in the customer of a small water and sewer company, and not the MCC. It is unclear exactly what the MCC's role would look like in practice if it is not allowed to appeal the utility's rate change.

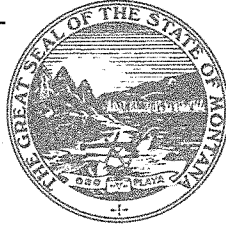
Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Brad Johnson", with a long horizontal flourish extending to the right.

Brad Johnson,
Chairman
Montana Public Service Commission

Montana Public Service Commission



Legislative Services Division
Attn. Sonja Nowakowski
P.O. Box 201704
Helena, MT 59620-1704
Public Comment on LCSMW2

Brad Johnson - Chairman
Travis Kavulla - Vice Chairman
Roger Koopman - Commissioner
Bob Lake - Commissioner
Tony O'Donnell - Commissioner

Dear Committee Members:

On behalf of the Public Service Commission, I'd like to submit the following public comments on LCSMW2. Our opinion of LCSMW2 is very similar to our opinion of LCSMW1: positive with a few reservations.

In terms of the need for this bill, our sentiments are the same as those expressed about LCSMW1, reprinted here for ease of reference:

1. First, the sheer number of small water and sewer utilities in need of regulation is such that working rate cases for all of them would pose a very serious burden to the PSC's current staffing levels.
2. Second, of that number of small water and sewer companies, at least 200 are not currently operating under the PSC's regulatory umbrella at all. We are not in contact with them.
3. We have not yet had success in persuading small water and sewer utilities to come forward and be regulated. The PSC is not historically in the business of seeking out companies to regulate, operating rather on a model where utilities come to us or we investigate based on service complaints
4. Bringing those small water and sewer utilities under our regulation would require additional staff.

For all those reasons, we approve of legislative attempts to solve the problem of small water and sewer utilities not in compliance with Commission rules, of which this bill is one.

Reservations on this bill stem from two areas: the workload likely to be created in response to the initial change, and how thoroughly the problem will be addressed. The Commission estimates it will require an additional 2 FTE, at a minimum, to bring the impacted utilities into compliance with both existing Commission rules, and this proposed legislation.

If all the 200 estimated small water and sewer utilities not in compliance, apply for standard rates, it's likely that some of them will adjust their current rates, either up or down. That will generate an initial wave of applications, and potentially complaints from customers. That will require significant staff time at the PSC to address.

Historically, when a small water and sewer company comes under the regulation of the Public Service Commission and the Commission establishes a standard rate tariff, this has not been

accompanied by a large number of consumer complaints. Based on that history, after the initial surge, we don't expect the volume of applications or consumer complaints to be unmanageable.

As long as small water and sewer companies retain some discretion rather than being required to adopt the standard rate, we could support this bill.

Thank you for the opportunity to point out some points in favor of and against this legislation. We look forward to working on it with you going forward.

Sincerely,

A handwritten signature in black ink, appearing to read "Brad Johnson", with a long horizontal flourish extending to the right.

Brad Johnson,
Chairman
Montana Public Service Commission